SATHU v. HAWTHORNDEN RUBBER ESTATE CO. LTD.

[O.C.J. (Ong J.) August 21, 1961]

[K.L. — Civil Suit No. 558 of 1959]

Damages — Cattle trespass — Injury to cattle from sodium arsenite spraying — Duty of care of estate owners.

On June 20, 1959 nineteen heads of cattle belonging to the plaintiff strayed on to the estate of the defendant company whilst grazing. The defendant company's estate had been sprayed with sodium arsenite a few days earlier. As a result of grazing on the contaminated grass, the complete herd died a few days later.

It was established that no warning to the plaintiff had been given of the sodium arsenite spraying. Notices giving warning of spraying had been in position, along the point of the estate where the cattle had entered, for four years but these had been removed by unknown persons on June 24, 1959.

The plaintiff claimed damages on the ground that the defendants well knowing that his cattle habitually grazed in the area adjoining the estate failed to give warning to the plaintiff of the sodium arsenite spraying and thereby committed a breach of their common law duty to a "neighbour" under the principle in *Donoghue* v. *Stevenson* (1).

Held: in order to be liable under the principle in *Donoghue* v. *Stevenson* (1) the defendant company must be shown to have been aware that the plaintiff's cattle, and not any cattle, were likely to stray on their estate. The evidence established that the defendant company did not reasonably foresee trespass on its estate of the plaintiff's cattle. The defendant company, therefore, owed no duty of care to the plaintiff and consequently was not liable for the injury to the plaintiff's cattle.

Case referred to:—

(1) *Donoghue* v. *Stevenson* [1932] A.C. 156.

The following cases were also cited in argument:

Mourton v. *Poulter* [1930] 2 K.B. 183, 187, 191; *Ponting* v. *Noakes & Ors.* [1894] 2 Q.B. 281, 284, 285-6, 290; *Latham* v. *R. Johnson & Nephew Ltd.* [1913] 1 K.B. at 404; *Monk* v. *Warbey & Ors.* [1935] 1 K.B. 75; *R. Addie & Sons (Collieries) Ltd.* v. *Dumbreck* [1929] A.C. 358, 375; *Hanson* v. *Wearmouth Coal Co. Ltd.* [1939] 3 All E.R. 47 at 50, 54; *Perkowski* v. *Wellington Corpn.* [1958] 3 All E.R. 368; *Read* v. *J. Lyons & Co. Ltd.* [1947] A.C. 156, 166; *Edwards & Anor.* v. *Rly. Executive* [1952] A.C. 737, 745; *Townsend* v. *Wathen* 103 E.R. 579; *Stansfeld* v. *Bolling* (1870), 22 L.T. 799; *Wormald* v. *Cole* [1954] 2 W.L.R. 613.

ACTION.

R. Ramani for the plaintiff.

M. Edgar for the defendant.

Cur. Adv. Vult.

Ong J.: In this action damages are claimed by the owner of trespassing cattle against a neighbouring landowner for injury suffered by his cattle while they were trespassing on the other party's land.

The plaintiff was and is a cattle-owner and milk-vendor. The defendant is a limited liability company owning and operating the Hawthornden Rubber Estate. The plaintiff lives in a squatter area situate on mining land adjoining the defendant's rubber estate, and his cattle-shed is approximately half-a-mile from the nearest boundary of that estate. A portion of the estate near such boundary was sprayed with sodium arsenite, a poisonous weed-killer, a few days before June 20, 1959. On the afternoon of that date a herd of cattle was let out to graze under the charge of the plaintiff's wife, and while grazing they strayed into the rubber estate with unfortunate consequences to themselves, as the whole herd of nineteen cattle — seventeen of which belonged to the plaintiff — died in the next two days. I am satisfied that the cause of death was none other than arsenic poisoning.

The indorsement of claim on the writ is for loss of 19 heads of cattle as a result of the negligence of the defendant, its agents or servants. In the statement of claim subsequently delivered, the plaintiff avers that the defendant's estate was not fenced off to prevent cattle from straying into it in times of grazing, that the spraying of a portion of the estate with sodium arsenite had been carried out without prior warning to the plaintiff, with the result that the plaintiff's cattle grazing within the estate had died of poisoning. The particulars of negligence are set out in these terms:

> " (a) the defendant caused to be sprayed the said poison well knowing that the plaintiff's cattle habitually grazed in the said area;
>
> (b) the defendant did not cause the plaintiff to be warned of the existing danger to his said cattle by reason of such spraying;
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> (c) the defendant well knowing that the estate was not fenced off at its boundary ought to have known that without such warning the said cattle will come into the said area for grazing; and
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> (d) the defendant having on a former occasion warned the plaintiff in a similar situation, should not have omitted to do so on this particular occasion."

By its defence, the defendant admits that its estate was not fenced to keep off straying cattle. It admits also the spraying of sodium arsenite. But it denies that grazing within the estate occurred habitually to the knowledge of the management, or that the plaintiff had had no warning of the danger, as notice boards in three languages informing the public of spraying operations on the estate had been standing on the estate boundaries for the past four years until their removal by a person or persons unknown on June 24, 1959. The defendant further denies all allegations of negligence and contends that it is not liable because the cattle suffered death as a result of the trespass on the defendant's property.

The use of sodium arsenite in estates, having won statutory recognition, must be taken to accord with the principles of good estate management. Its use in estates, however, is made subject to certain precautionary measures laid down in Regulation 11(1) of the Poisons (Sodium Arsenite) Regulations, 1949, in which paragraphs (a) to (f) relate exclusively to safety

rules for the protection of labourers, and paragraph (g), whether or not it relates to labourers also, is as follows:

"Precautions for the protection of labourers.

11. (1) The manager of any estate or plantation or the holder of a permit issued under these Regulations —

xxxx xxxx xxxx xxxx

(g) shall display or cause to be displayed in conspicuous places at reasonable intervals on the boundaries of areas which have been treated with sodium arsenite notices with a warning that the areas within the boundaries have been treated with sodium arsenite. Such notices shall be in the English, Malay, Chinese and Tamil languages and shall not be removed until the area treated as aforesaid has been cleansed by a heavy rainfall."

Mr. Ramani contends that the defendant is liable both for negligence at common law and for breach of statutory duty by failing to exhibit the requisite warning notices in accordance with Regulation 11(1)(g). The statement of claim, however, is based solely on negligence at common law, and, without any amendment thereof (which was not asked for after objection raised by Mr. Edgar) I do not think any claim in respect of breach of statutory duty can be entertained. Therefore no useful purpose can be served by discussing hypothetically the various interesting propositions that otherwise would have fallen to be considered.

On the other part of the plaintiff's case Mr. Ramani's argument is that the established principles of common law governing liability of occupiers towards trespassers are now subject to certain modifications flowing from the tendency of modern courts of law towards making moral culpability the test of liability in tort. These are: first, that an occupier owes a duty even to trespassers not to bring on to the land recklessly anything which might cause them injury; secondly, the classic statement of the law enunciated by the Lord Atkin in *Donoghue* v. *Stevenson*:[1]

"The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, 'Who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

Several cases were cited by counsel in argument which are no more than illustrations of well-settled principles. I do not propose to discuss them for the reason that it seems to me that they depend upon a consideration of their own facts, while the present case turns upon certain facts entirely peculiar to itself.

The cornerstone of the plaintiff's case is that the defendant owed a legal duty to him to give prior warning of the intention to spray sodium arsenite on its estate. It is necessary therefore to examine the evidence closely in order to determine whether or not in the circumstances of this case the claim is one of substance or a shadow.

In paragraph 3 of the statement of claim it is stated that "the estate is not in any manner fenced off so as to prevent cattle straying into it during times of grazing; and the plaintiff will aver that such grazing occurred habitually to the knowledge of the authorities of the estate." The last averment is expressly denied. Of course, whatever may be the truth of the matter as regards cattle belonging to third parties, my concern is to consider the question, not *in vacuo*, but only the position of the plaintiff and defendant *inter se*. That position is set out in paragraphs (a) & (c) of the particulars of negligence, and if the plaintiff is to succeed in his claim these allegations, on which he relies, must be satisfactorily established.

The principles applicable to this case are, in my view, quite clear. A man owes certain duties to his neighbour, but liability in law is limited strictly to neighbours coming within the category of those defined by Lord Atkin as "persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

Coming to actual evidence, I shall deal first with the case for the defendant. Mr. H. B. Bruce, the manager of Hawthornden Estate, said that sodium arsenite had been constantly used in that estate all the year round, weather permitting; and that warning notice-boards had been put up at strategic points throughout the estate permanently. As regards straying cattle his evidence is as follows:

"Whenever on inspection we see cattle in the estate, we get hold of the herd and inform the owner to keep his animals off our land. This has been done repeatedly . . . I cannot say that I have personally seen and warned plaintiff or his wife . . . (as regards spraying) we do tell the squatters when we see them. I am not in a position to say, whether on this particular occasion, the plaintiff had been told. Plaintiff came and complained. He did not, however, complain that there was no board giving warning."

The estate conductor Pitchay Gnanu had this to say of straying cattle:

"I personally used to tell the cattle-owners that we were spraying and to keep out their cattle."

Answering cross-examination by Mr. Ramani, he said:

"I used to warn cattle-owners against allowing their cattle to stray. The spraying was by a Chinese contractor. It was my duty, not his, to go round and tell . . . Unless I see cattle straying into the estate, I don't warn the owners."

As regards the case for the plaintiff, his evidence, briefly, is that on this particular occasion he had not been warned, but previously, about four years earlier, he had been given due warning, as a result which he had kept his cattle off the estate; no warning had been given him

since then. I accept this evidence that he had had no warning since the previous occasion, which was the first and the last, about four years earlier.

On the question of grazing, however, the plaintiff had said that at all times while his cattle were out, they were under the charge of his wife. She accompanied the cattle, morning and afternoon — a regular practice for many years — including on the fatal day. The plaintiff's own job was milking and selling milk. His wife only would know where the cattle were taken to graze. In the light of these admissions, I reject the plaintiff's evidence that his cattle had during the preceding two years occasion to pass "through the estate to graze elsewhere." The size and situation of the estate, as shown in the map of the estate (Ex. D5), sufficiently disproves that statement, unless the herd was deliberately led into the estate to graze inside the estate, which both he and his wife have denied in the clearest of terms.

Direct, as opposed to hearsay, evidence on grazing was supplied by the plaintiff's wife. According to her, on the day in question she led the cattle to graze near the estate boundary, but outside the estate, and the cattle ran into it and for some time refused to be driven out, until she managed to get them out eventually, after, I suppose, they had grazed to their satisfaction. For years, prior to that occasion, the cattle had never been in or through the estate. In her own words: "I have never before led the cattle into the estate or through the estate to get to other grazing grounds. About 6 years ago there was a warning of bud-grafting going on and we were warned not to allow cattle to go in; not on account of use of weed-killers, but to protect the young rubber. Since then I have never allowed my cattle to graze or go through or into the estate." At this stage I pause to observe that the date she recalled of the warning by the estate tallies exactly with the evidence of Mr. Bruce on replanting having taken place in 1955.

The remainder of the evidence on both sides is of hardly any material value. Proceeding, therefore, on the basis of the evidence as recounted above, which consists either of facts not disputed or admissions I find: (a) that a warning was conveyed to the plaintiff in 1955 to keep his cattle from straying into the defendant's estate; (b) that the plaintiff or, rather, his wife, in fact heeded such warning for four years from 1955 until June, 20, 1959; and (c) that the defendant conveyed no express warning of sodium arsenite spraying to the plaintiff in June 1959, or of any similar operations since 1955.

Applying the test of reasonable foreseeability laid down by Lord Atkin, I am clearly of opinion that the fact of the plaintiff's heeding of the defendant's warning from 1955 for all of four years, without requiring that the warning be repeated, not only disproves the allegation of knowledge on the part of the defendant that the plaintiff's cattle habitually grazed inside the estate, but also afforded reasonable cause for the defendant to expect that the plaintiff required no reminder of the warning to keep his cattle off the estate. This is a complete answer to each and every paragraph of the particulars of alleged negligence.

There are certain other material facts which I think are significant. Mr. Ramani concedes that a landowner is under no obligation to fence his land to prevent cattle trespass. Nevertheless paragraph 3 of the statement of claim refers to cattle straying into the estate during times of grazing. To "stray" means to wander off the proper limits. Docile animals such as milk cattle do not stray when in charge of their keeper. Hence the question of what the cattle would have done if left to themselves does not arise. As to their being drawn to the area by the scent of new-mown hay — which is said to be the scent emanating from weed treated with sodium arsenite — I do not think it was an allurement of such a nature as to cause them to be no longer responsive to their keeper.

There only remains the question of the warning notices. I do not for a moment believe that a responsible estate manager, in charge not only of Hawthornden Estate but also of another, Wardieburn Estate, deliberately flouted the requirements of the Poisons (Sodium Arsenite) Regulations, which were in force since 1949. I accept the evidence of Mr. Bruce and his estate conductor which was corroborated by Police Sergeant 4009. I do not believe the plaintiff when he said he had seen no warning notices put up on the estate boundaries. The fact that his herd was for four years kept away from the estate is proof enough that the estate had put up warning notices which were removed or destroyed after the event. In any event, the putting up of such notices is neither here nor there, in the circumstances of this case. What is truly material is that, after the warning given in 1955, no act or omission on the part of the plaintiff gave the defendant reasonable cause to suppose that without a reminder to the plaintiff, his cattle would be conducted by a responsible keeper to trespass on the defendant's estate. Clearly such trespass was not reasonably foreseeable. I sympathise with the plaintiff in his misfortune, but I regret to say that there are no merits in his case.

The claim is accordingly dismissed with costs.

Claim dismissed.

Solicitors: *Braddell & Ramani; Bannon & Bailey.*